

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Waycross Division

In the matter of:

ALFRED C. DOWDY
(Chapter 12 Case 587-00088)

Debtor

UNITED STATES OF AMERICA

Plaintiff

v.

ALFRED C. DOWDY

Defendant

Adversary Proceeding

Number 587-0026

FILED

at 11 O'clock & 36 min. A M

Date 2/8/88

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia *peB*

MEMORANDUM AND ORDER

Trial of the above-captioned adversary seeking to determine a debt non-dischargeable under 11 U.S.C. Section 523(a)(6), was conducted on December 3, 1987. After consideration of the evidence, the briefs subsequently filed and applicable precedent I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1) Defendant Dowdy holds a Ph.D. in Agriculture from Ohio State University. For a number of years of he has engaged in the business of cattle farming. In recent years, through considerable effort, he began to selectively breed cattle in such way as to eliminate fat from the beef in the belief that such beef would be popular among consumers anxious to reduce the level of fat in their diets.

2) Dowdy was a borrower from FmHA beginning in 1979 and, by stipulation, it is agreed that he owed FmHA approximately \$476,894.00 when his Chapter 7 case was filed in this Court. (Government Exhibit 1-A, 1-B, 1-C).

3) As security for repayment of this debt Dowdy had granted FmHA a security interest in all crops, all farm equipment, and all livestock, subject to a first lien to the Small Business Administration as to the equipment and livestock. (Government Exhibit 2-A, 2-B). Dowdy was well aware of this security interest in the herd and the proceeds derived from it.

4) The livestock security interest listed 632 head of cattle and extended to all "increases, replacements, substitutions, and additions thereto, now owned or hereafter

acquired." (Security Agreement ¶II, item 3).

5) Debtor agreed to "assemble the collateral and make it available to secured party at such time(s) and place(s) as designated by secured party." [Security Agreement ¶IV.B(2).]

6) Debtor agreed in ¶IV.K that

"SECURED PARTY HAS INFORMED DEBTOR THAT DISPOSAL OF PROPERTY COVERED BY THIS SECURITY AGREEMENT WITHOUT THE CONSENT OF SECURED PARTY, OR MAKING ANY FALSE STATEMENT IN THIS SECURITY AGREEMENT OR ANY OTHER LOAN DOCUMENT, MAY CONSTITUTE A VIOLATION OF FEDERAL CRIMINAL LAW."

This language was set forth just above Debtor's signature in bold, all capitalized letters.

7) Debtor filed a Chapter 11 case in this Court in 1982. The case was ultimately dismissed because Debtor was unable to propose a confirmable plan.

8) I now must attempt to undertake the "bankruptcy judges empirically impossible task, that of deciding how many cattle were in a bankrupt farmer's field years ago, and where they went." In re Cline, 52 B.R. 301 (Bankr. W.D.Ky.

1985). Just prior to and during the pendency of the Chapter 11 case Dowdy transferred or sold a large percentage of his herd to others. Some 400 head were "sold" to his wife in order to induce her to advance the money necessary to feed and care for them. In the absence of this infusion of cash the herd would have died or been slaughtered. Of these, 90 head are still on hand and 251 head were repossessed by the SBA. Forty-Seven additional head of cattle are out of state in the custody of acquaintances of Dowdy who are caring for them under an agreement whereby the offspring of the herd are split 50-50 with Dowdy. Twenty-Five head of cattle were sold with FmHA permission. Fourteen bulls were sold in 1983 and the proceeds were remitted to FmHA. Forty-Nine head were allegedly stolen by another farmer and Debtor's wife has a civil action pending for this conversion in State Court. Unaccounted for cattle are therefore:

Pledged		632
Sale Approved	25	
Out-of-State	47	
Proceeds Remitted	14	
Stolen	49	
On Hand	90	
SBA	253	
	<u>478</u>	
		478
Total		<u>154</u>

9) Both Dowdy and FmHA valued the remaining cattle at \$300-\$400 per head. Dowdy valued the specially-bred

herd repossessed by SBA at \$1,500 per head.

10) The offspring of the original herd should have numbered 2128 calves over a seven-year period. None of these have been accounted for. However, counsel conceded that FmHA sought no recovery on account of these cattle, but only for the unaccounted for cattle in the original herd.

11) I find that the unaccounted for herd is 154 head of cattle. While FmHA urges that the out-of-state cattle be added to this number, due to the difficulty of recovery of them, it did not challenge the existence or number as testified by Dowdy. While recovery of these cattle would be expensive and difficult for a local lender, FmHA has offices and agents nationwide. Accordingly, it can repossess and sell these cattle with equal ease wherever they are located. FmHA also urges me to disregard the testimony concerning the stolen cattle and treat those 49 head as unaccounted for as well. I decline to do so because of the uncontradicted testimony of Dowdy that this herd was in fact stolen, coupled with evidence that legal action has been taken to recover the herd or its value.

CONCLUSIONS OF LAW

The action is brought under 11 U.S.C. Section 523(a)(6) which creates an exception to dischargeability of debts "for willful and malicious injury by the debtor to another entity." This language has been construed to include a debtor's willful and malicious conversion of assets pledged to another. In re McCloud, 7 B.R. 819, 823 (Bankr. M.D.Tenn.1980); In re Carver, Adv. No. 585-0005 (Bankr. S.D.Ga. May 29, 1985); In re Walker, Adv. No. 487-0009 (Bankr. S.D.Ga. June 2, 1987).

The term "willful and malicious" has been subject to differing interpretations. Some courts have held that it requires a specific intent to cause injury to a particular person, others that it requires an intentional act which results in foreseeable injury, and others that it requires an act done recklessly in disregard of the consequences. In this Circuit, the applicable standard is that the act must have been "wrongful and without just cause or excuse, even in the absence of personal hatred, spite or ill will . . . it means nothing more than intentionally doing a wrong act which necessarily leads to injury." Vickers v. Home Indemnity Co., Inc., 546 F.2d 1149 (5th Cir. 1977). In re Askew, 22 B.R. 641 (Bankr. M.D.Ga. 1982), aff'd 705 F.2d 469 (11th Cir. 1983). There need not be subjective conscious intent to do harm. In re Bush, Adv. No.

583-0067, (Bankr. S.D.Ga. Sept. 9, 1985).

There is no question that Debtor's acts in selling part of the herd to his wife and in moving some of the herd out-of-state without the consent of FmHA were in violation of the terms of the security agreement and thus were "wrongful" as well as "intentional". The more difficult question is whether the acts he committed were also "without just cause or excuse." As always, the determination of the debtor's intent is difficult and Debtor has given an explanation for his actions which, at least facially, might constitute subjective "cause" for the actions he took. By any objective criteria, however, these acts cannot be said to be justified. His sale of part of the herd and interstate transportation of others smacks more of concealment or an effort to circumvent or elude the reach of FmHA's lien than a bona fide effort to save the herd for the benefit of FmHA. His explanation that he sold the herd to his wife "so she would feed the cattle" defies logical explanation. As an educated man, Dr. Dowdy must have known or had reason to suspect that his wife could have loaned him funds to do the same thing and taken a junior lien in the cattle behind FmHA, without the necessity of transferring title in the cattle. That title was transferred suggests strongly that Debtor thought the transfer would somehow divest or make more difficult FmHA's realization on its lien.

Since the only rationale given for the transfer falls short of constituting legal justification and since no one else testified on this point, I conclude that the act was without just cause.

Thus, his acts constitute a conversion of FmHA's collateral, liability for which is not dischargeable. Ford Motor Credit Co. v. Owens, 807 F.2d 1556 (11th Cir. 1987). (Where car dealership disposed of cars without accounting for proceeds to creditor in contravention of express trust provisions, his debt to creditor is nondischargeable).

In determining the damages suffered, there was no evidence of the amount of proceeds, if any, Debtor actually received for the cattle sold. Rather FmHA asks for judgment for the number of cattle unaccounted for at a \$400 price per head. Debtor argues that mere shrinkage of his herd size is no measure of FmHA's damages in the absence of proof that the cattle that are unaccounted for were converted rather than died of natural causes. I would find this argument compelling if the only evidence in the case was that a herd shrunk in size and if there were only evidence of disease or theft to explain it. Here, however, Debtor's actions in selling and moving cattle raises an inference that the unaccounted for cattle were, in fact,

converted. Since Debtor's own acts implicate him he must bear the risk of loss if he is thereafter unable to account for the missing cattle. The burden of proof shifts to him once the FmHA makes out a prima facie case. In re Phillipps, 54 B.R. 273 (Bankr. D.Colo. 1985); Brown v. Hardwick Bank & Trust Co., 32 B.R. 554 (Bankr. E.D.Tenn. 1983).

The Court is aware of and most sympathetic with the potential difficulty, and perhaps hardship, that may come as a result of this or any judgment that a debt is non-dischargeable. However, Debtor borrowed nearly half a million dollars from an agency funded by the taxpayers, most of which will be discharged in this proceeding. Since his actions have been proven to have constituted a willful and malicious injury, the least that can be required of him is that that portion of the debt be repaid.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law IT IS THE ORDER OF THIS COURT that FmHA is entitled to judgment for and a determination that a portion of the debt owed to it is nondischargeable in the amount of \$61,600.00.

Debtor is FURTHER ORDERED to provide FmHA with the name and address of any persons in possession of the out-of-state cattle, their exact location, written authorization to such persons in possession to release the herd to FmHA, and such other assistance as FmHA may request pursuant to his duty to assemble and make the collateral available.

Finally, Debtor IS ORDERED to provide a full accounting to FmHA of any and all proceeds received from the State Court litigation over the stolen cattle.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 5th day of February, 1988.

FILED

1-8K 95
(Rev. 6/82)

United States Bankruptcy Court

at 11 O'clock & 36 min. AM

Date 2/8/88

For the SOUTHERN District of GEORGIA MARY C. BECTON, CLERK

United States Bankruptcy Court
Savannah, Georgia *PCB*

No. 587-0026

Case Number 587-00008

UNITED STATES
OF AMERICA

ALFRED C. DOWDY

v.

Plaintiff,

Defendant

**JUDGMENT
ON DECISION
BY THE COURT**

This proceeding having come on for trial or hearing before the court, Honorable

Lamar W. Davis, Jr.

, United States Bankruptcy Judge,

presiding, and the issues having been duly tried or heard and a decision having been rendered,

It is Ordered and Adjudged

That the Plaintiff, UNITED STATES OF AMERICA, shall recover of the Defendant, ALFRED C. DOWDY, the principal sum of Sixty-One Thousand Six Hundred Dollars and 00/100 Cents (\$61,600.00), together with interests at the rate of 7.14% per annum from date until paid in full.

MARY C. BECTON

Clerk of Bankruptcy Court

[Seal of the U.S. Bankruptcy Court]

Date of issuance: February 5, 1988

By: *Patsy C. Burkhalter*

Deputy Clerk

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